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Allyson Ross
Allyson Ross

July 11, 2008

Date

Attorney File Ref: 102790-129 / 30056 US3

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: Thomas MCGEE et al.
Serial No.: 10/531803
Filed: 18.April.2005
Examiner: Preeti KUMAR
Art Group: 1751
Title: TEXTILE TREATMENT COMPOSITION INCLUDING A
SUBLIMABLE MATERIAL

PER TELEFAX: 571 273-8300

BOX: APPEAL BRIEF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313 – 1450

11 July 2008

Dear Sir;

APPELLANTS' BRIEF ON APPEAL PURSUANT TO 37 CFR § 41.37

SIR:

This is an appeal from the final rejection of claims 1, 2 and 11-27 of the present application. Applicant's had filed a Notice of Appeal on 30.May.2008.

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(1) **REAL PARTY IN INTEREST**

The real party in interest is Givaudan SA by virtue of an assignment recorded in the United States Patent and Trademark Office on April 27, 2005, at Reel 016173, Frame 0186.

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(2) **RELATED APPEALS AND INTERFERENCES**

There are no prior or pending appeals, interferences or judicial proceedings, known to Appellants, Appellants' representative, or the Assignee, that may be related to, or that will directly affect or be directly affected by or have a bearing upon, the Board's decision in the pending appeal.

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(3) **STATUS OF CLAIMS**

Claims 1, 2 and 11-27 are on appeal.

Claims 1, 2 and 11-27 are pending.

Claims 1, 2 and 11-27 are rejected.

Claims 3-10 are canceled.

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(4) **STATUS OF AMENDMENTS**

A Request for Reconsideration under 37 C.F.R. 1.116, without claim amendments, was filed on April 18, 2008 in response to the final Office Action. The Examiner has entered and considered the Request for Reconsideration, but alleges that the Request for Reconsideration does not place the application in condition for allowance.

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(5) **SUMMARY OF THE CLAIMED SUBJECT MATTER**

The present application contains two independent claims, viz., claims 1 and 25.

Claims 2 and 11-24 depend either directly or indirectly from claim 1; and claims 26 and 27 depend either directly or indirectly from claim 25.

Independent claim 1 relates to a textile treatment delivery system (see page 1, lines 8-11, page 11, lines 25 and 26 and page 12, lines 8-13) adapted to impart textile conditioning composition and fragrance to a fabric (page 1, line 15) while it is being dried in a heated drier (see page 1, lines 9-11, 15 and 16, page 12, lines 1-6 and page 15, lines 13 and 14). The textile treatment delivery system comprises at least one textile conditioning composition (see page 1, lines 9-11 and page 4, lines 16-20) and at least one fragrance (see page 1, lines 9-11 and page 8, line 17 – page 9, lines 12) in a sublimable carrier substance (see page 1, lines 9-11, page 2, lines 20-27 and page 3, lines 1 – page 4, line 9).

Independent claim 25 relates to a method of providing textile conditioning and fragrance to a fabric (page 1, line 15, page 2, lines 8-11 and page 11, lines 26-29) that is being dried in a heated drier (see page 1, lines 9-11, 15 and 16, page 12, lines 1-6 and page 15, lines 13 and 14). The method comprises the addition to the fabric in the drier of at least one textile conditioning composition (see page 1, lines 9-11 and page 4, lines 16-20) and at least one fragrance (see page 1, lines 9-11 and page 8, line 17 – page 9, line 12) in a sublimable carrier substance (see page 1, lines 9-11, page 2, lines 20-27 and page 3, line 1 – page 4, line 9).

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(6) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following ground of rejection is presented for review:

- I. Whether claims 1, 2 and 11-27 are unpatentable under 35 USC 103(a) as over U.S. Patent No. 4,382,111 to Kuwayama et al. (hereinafter "Kuwayama") in view of U.S. Patent No. 4,233,161 to Sato et al. (hereinafter "Sato").

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(7) **ARGUMENT**

As will be detailed below, Kuwayama and Sato, taken singly or in combination do not teach or suggest all of the features recited in method claims 1 and 25.

Claims 1, 2 and 11-27 Are Patentable over Kuwayama in view of Sato because a Prima Facie Case of Obviousness Cannot be Established

Claims 1, 2 and 11-27 were rejected under 35 U.S.C. 103(c) as allegedly being unpatentable over Kuwayama in view of Sato.

Appellants respectfully traverse the rejection of the foregoing claims in view of Kuwayama further in view of Sato.

Neither Kuwayama nor Sato, taken singly or in combination, teaches or suggests a textile treatment delivery system adapted to impart textile conditioning composition and fragrance to a fabric while it is being dried in a heated drier, the delivery system comprising at least one textile conditioning composition and at least one fragrance in a sublimable carrier substance as required by claim 1. Additionally, neither Kuwayama nor Sato, taken singly or in combination, teaches or suggests a method of providing textile conditioning and fragrance to a fabric that is being dried in a heated drier, comprising the addition to the fabric in the drier of at least one textile conditioning composition and at least one fragrance in a sublimable carrier substance as required by claim 25.

Kuwayama discloses a process of treating fibers such as yarn so as to impart lubricity to fibers by the application of a sublimable substance. At best, Kuwayama is relevant to lubricating fibers which are later to be used in spinning toward mating operations as the lubricity imparted upon the fibers appears not to have a detrimental effect

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when post-treated. The industrial method of treating fibers disclosed in Kuwayama can be distinguished from domestic processes for treating of a fabric with a textile conditioning composition and fragrance while the fabric is being dried in a heated drier, e.g., clothes dryer as may be found in a consumer's domestic residence. A skilled artisan would not be led to produce the presently claimed system and method of treating fabric from the teaching of Kuwayama which are directed to lubricating industrial fiber/yarn.

Kuwayama clearly fails to teach or to even remotely suggest a system and a method to impart textile conditioning composition and fragrance to a fabric being dried in a heated drier as required by claims 1 and 25, respectively. Sato does not remedy this deficiency of Kuwayama because Sato merely discloses that adamantane and cyclododecane sublimable compositions are useful as a carrier for perfume, as acknowledged by the Examiner (at page 5 of the December 19, 2008 final Office Action), and fails to teach or suggest that the adamantane mixed with perfume is used to treat a fabric.

In the December 19, 2008 final Office Action and the May 15, 2008 Advisory Action, the Examiner alleges that (1) Kuwayama teaches the claimed adamantane sublimable substance applied to fiber/yarn, (2) one of ordinary skill would have been motivated to combine the teachings of Kuwayama with Sato since both references teach the analogous art of adamantane sublimable compositions and Sato teaches that adamantane sublimable compositions are carriers for perfume, and (3) Appellants' arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from references. Appellants respectfully disagree with the Examiner's allegations.

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First, Kuwayama does not teach the claimed adamantane sublimable substance applied to fiber/yarn as erroneously alleged by the Examiner. Rather, Kuwayama discloses an industrial process of treating fibers such as yarn so as to impart lubricity to fibers by the application of a sublimable substance. Kuwayama is only relevant insofar as the lubrication of fibers which are later to be used in spinning toward matting operations as the lubricity imparted upon the fibers appear not to have a detrimental effect when post-treated. The industrial treating of fibers disclosed in Kuwayama is not the same as or similar to the domestic treating of a fabric or garments, e.g. clothes, with a textile conditioning composition and fragrance while the fabric is being dried in a heated drier. A skilled artisan would not be led to produce (a) the textile treatment delivery system to a fabric being dried in a heated drier of claim 1 and (b) the method of providing textile conditioning and fragrance to fabric being dried in a heated drier of claim 25 from the teachings of Kuwayama which are directed to an industrial lubricating of fiber/yarn to be used in spinning toward matting operations.

Sato does not remedy the deficiencies of Kuwayama because Sato merely discloses adamantane mixed with perfume, as acknowledged by the Examiner. Nowhere does Sato disclose a system or method for treating a fabric or that the adamantane mixed with perfume is used to treat a fabric. A skilled artisan would not be led to produce Appellant's presently claimed system and method from the teachings of Kuwayama which is directed to industrial lubricating of fibers/yarns and Sato which are directed to adamantane mixed with perfume, as erroneously alleged by the Examiner.

Second, the teachings of Kuwayama and Sato are not directed to an analogous art of adamantane sublimable compositions as erroneously alleged by the Examiner. Instead, Kuwayama is directed to an adamantane composition being used as a lubricating means,

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and Sato is directed to an adamantane composition being used a means to disseminate fragrances into the atmosphere. Contrary to the Examiner's allegations, one of ordinary skill would not have been motivated to combine the teachings of Kuwayama (directed to a lubricating means for fibers/yarns) with the teachings of Sato (directed to an atmospheric disseminating means) to achieve the system and method to impart textile conditioning composition and fragrance to a fabric while it is being dried in a heated drier.

Third, the Examiner erred in determining that Appellants' arguments failed to comply with 37 CFR 1.111(b) because Appellants' arguments are more than general allegations. Kuwayama fails to teach or suggest, in any reasonable manner, the use of a sublimable material as a carrier for further constituents, or as being useful with further constituents. At completion of Kuwayama's process, the sublimable material applied would likely have completely dissipated and thus provide no useful treatment benefits to finished goods, or textiles. Indeed it is clear that Kuwayama's process relates to discrete fibers or yarns, and is not related to finished goods such as fabrics or garments. The Examiner erred in this determination because, at col. 6, lines 22-31, Kuwayama teaches:

A small amount of the sublimable substance remains deposited on the knitted and woven fabrics, which should be removed because it is not needed after the knitting or weaving. The removal of the residual sublimable substance can be performed merely by allowing the knitted, woven or like fabrics to stand because the deposited material is sublimable. Thus, the present invention has an important feature that the step of removing the lubricant, which is essential for the conventional methods, can be omitted.

Moreover, at col. 7, lines 24-32, Kuwayama teaches:

Although a small amount of the sublimable substance remains deposited on the fiber product, when being allowed to stand, it dissipates over a period of time. Thus, the step of removing the residual lubricant, which is essential for the conventional methods, can be omitted. Furthermore, when the fibers are sent to the subsequent operations while still containing the sublimable substance and are processed therein, the sublimable substance is evaporated and removed.

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Kuwayama clearly teaches that for conventional methods of lubricating yarn which is woven or knitted into a textile, removal of the residual lubricant is essential. At best, Kuwayama teaches a lubricant for application to fibers of yarns well prior to the manufacture of any finished goods produced therefrom, and does not teach or suggest any treatment benefits which are relevant to a clothes dryer or to the treatment of finished goods because the residual sublimable substance of Kuwayama is necessarily removed. Kuwayama thus teaches away from system claim 1 and method claim 25 because Kuwayama discloses that the residual sublimable lubricant is to be removed and not allowed to remain on the fiber/yarn product made from the lubricated yarn. Therefore, a skilled artisan, seeking to provide a solution whereby garments, other finished goods or fabrics which are tumbled in a conventional clothes dryer would not consider Kuwayama's processes to be relevant in any way or manner.

The Examiner also erred in determining that the delivery of adamantane to textile in a heated drier as recited in claims 1 and 25 is taught by Kuwayama because Kuwayama discloses the alleged same adamantane sublimable substance's placement in an appropriate pot or evaporation chamber with subjection to heat which encompasses the broad scope of the claimed dryer. Appellants respectfully disagree with this allegation by the Examiner.

At col. 7, lines 1-9, Kuwayama discloses:

The sublimable substance is deposited on the fibers either by a method in which the sublimable substance is placed in an appropriate pot or evaporation chamber and evaporated by heating or placing it under reduced pressure, or by a method in which the sublimable substance is converted into any desired form, such as an emulsion, a suspension, a solution and an aerosol, by the usual procedure and then brought in contact with the fibers by techniques, such as coating and soaking;

Kuwayama discloses depositing the sublimable substance on the fibers by evaporating the sublimable substance in a pot or evaporation chamber by heating or placing

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the sublimable substance under reduced pressure for evaporation. Claims 1 and 25 require the fabric to be dried in a heated drier and not to be heated in a pot or evaporation chamber as disclosed in Kuwayama. The pot or evaporation chamber of Kuwayama is utilized in industrial systems and processes for lubricating fibers and the claimed heated drier is utilized in domestic systems and processes for drying and treating textiles or fabrics. Thus, the pot or evaporation chamber of Kuwayama is not the same as or similar to heated drier required in claims 1 and 25 because the pot or evaporation chamber of Kuwayama is used in an entirely different process and for an entirely different purpose. Therefore, a skilled artisan, seeking to provide a solution whereby textile conditioning composition and fragrance are imparted to fabrics while the fabrics are being dried in a conventional clothes dryer would not consider Kuwayama's pot or evaporation chamber to be relevant in any way or manner as erroneously alleged by the Examiner.

Appellants also traverse the reliance upon Sato in seeking to address and over, the fatal shortcomings out of Kuwayama. The Examiner points to a passing statement at col. 2, lines 15 - 21 which makes reference that sublimable hydrocarbons can be used in compositions of Sato, which sublimable hydrocarbons may include adamantine. Sato however does not teach or even remotely suggest the utility of his compositions on textiles. It is only the Examiner's erroneously statement that "... it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to modify the teachings composition of Kuwayama et al., with a fragrance in a sublimable carrier, as recited by the instant claims, because Sato et al. teach that adamantine and cyclododecane sublimable compositions are useful as a carrier for perfume and Kuwayama teaches the analogous adamantine and cyclododecane sublimable substances for application to textile. One of

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ordinary skill in the art would be motivated to combine the teachings of Kuwayama et al. with that of Sato et al. since both references teach the analogous sublimable substances." Appellants strongly traverse the Examiner's presupposition of this point.

It is Appellants' viewpoint that the relevant skilled artisan would be one faced with the technical problem of seeking to provide an improved textile treatment benefit to finished goods and textiles which treatment process can be practiced in and/or imparted via a clothes dryer. Neither Kuwayama nor Sato, taken singly or in combination, appear to be relevant, as neither of these references teach or suggest the utility of their processes or their compositions in such a manner or in such an environment of use. First, Sato is wholly silent on this point. Second, the Examiner, at best, alleges that Kuwayama would suggest various generic modes of applying a sublimable material directly to fibers or yarns which however are not practiced in a clothes dryer as required by claims 1 and 25. It is Appellants' viewpoint that only by "hindsight reconstruction" has the Examiner selected among the various statements within Kuwayama and Sato in order to reconstruct the system and method as required in claims 1 and 25, respectively. However, as is well-recognized in the jurisprudence such a hindsight reconstruction is impermissible.

In view of the foregoing remarks, Appellants disagree with the Examiner's position and traverse the Examiner's rejection, and assert that the Examiner has not met the proper burden of proof to present and maintain the rejection; such are simply unsupported by the facts for the reasons noted above. Rather, Appellants contend that the Examiner's grounds of rejection is at, at best, a hindsight reconstruction, using Appellants' claims as a template to reconstruct the invention by picking and choosing amongst isolated disclosures from the prior art. This is impermissible under the law. Accordingly, reconsideration of the propriety

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of the rejection of claims 1, 2 and 11-27 and its withdrawal is respectfully requested.

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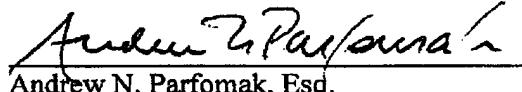
(8) **CONCLUSION**

For all of the reasons discussed above, it is respectfully submitted that the rejections are in error and that claims 1, 2 and 11-27 are in condition for allowance. For all of the above reasons, Appellants respectfully request this Honorable Board to reverse the rejection of claims 1, 2 and 11-27.

CONDITIONAL AUTHORIZATION FOR FEES

Should any further fee be required by the Commissioner in order to permit the timely entry of this paper, the Commissioner is authorized to charge any such fee to Deposit Account No. 14-1263.

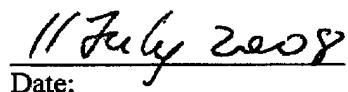
Respectfully Submitted:



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Date:

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(9) **CLAIMS APPENDIX**

The claims on appeal read as follows:

1. (original) A textile treatment delivery system adapted to impart textile conditioning composition and fragrance to a fabric while it is being dried in a heated drier, the delivery system comprising at least one textile conditioning composition and at least one fragrance in a sublimable carrier substance.

2.(original) A textile treatment delivery system according to claim 1, in which the sublimable substance has a sublimation temperature in the operating temperature range of the drier.

3-10.(canceled)

11.(previously presented) A textile treatment delivery system according to claim 1 in which the sublimable substance has a maximum molecular weight of 200.

12.(previously presented) A textile treatment delivery system according to claim 1 in which the sublimable substance has a maximum molecular weight of 170.

13.(previously presented) A textile treatment delivery system according to claim 1, in which the sublimable substance includes adamantane.

14.(previously presented) A textile treatment delivery system according to claim 2, in which the sublimable substance includes adamantane.

15.(previously presented) A textile treatment delivery system according to claim 1, in which the sublimable substance is a blend of at least two sublimable substances.

16.(previously presented) A textile treatment delivery system according to claim 15, in which one of the sublimable substances is adamantane.

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- 17.(previously presented) A textile treatment delivery system according to claim 16, in which one of the sublimable substances is adamantane, which is present to the extent of at least 50% by weight of the total sublimable substance
- 18.(previously presented) A textile treatment delivery system according to claim 1, in which the sublimable substance comprises not more than 60%wt. of the total weight of the textile treatment delivery system.
- 19.(previously presented) A textile treatment delivery system according to claim 18, in which the sublimable substance comprises not more than 50%wt. of the total weight of the textile treatment delivery system.
- 20.(previously presented) A textile treatment delivery system according to claim 19, in which the sublimable substance comprises not more than 40%wt. of the total weight of the textile treatment delivery system.
- 21.(previously presented) A textile treatment delivery system according to claim 1, in which the textile conditioning composition is selected from fabric softener compositions, anti-static compositions, and compositions that provide simultaneous fabric softening and anti-static benefits to treated fabrics.
- 22.(previously presented) A textile treatment delivery system according to claim 2, in which the textile conditioning composition is selected from fabric softener compositions, anti-static compositions, and compositions that provide simultaneous fabric softening and anti-static benefits to treated fabrics.
- 23.(previously presented) A textile treatment delivery system according to claim 13, in which the textile conditioning composition is selected from fabric softener compositions, anti-static compositions, and compositions that provide simultaneous fabric softening and anti-static benefits to treated fabrics.

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24.(previously presented) A textile treatment delivery system according to claim 1, in which the fragrance composition includes at least one aroma chemicals that has a low vapour pressure and at least one that has a high vapour pressure.

25.(previously presented) A method of providing textile conditioning and fragrance to a fabric that is being dried in a heated drier, comprising the addition to the fabric in the drier of at least one textile conditioning composition and at least one fragrance in a sublimable carrier substance.

26.(previously presented) The method according to claim 25 wherein the sublimable substance has a sublimation temperature in the operating temperature range of the drier.

27.(previously presented) The method according to claim 26 wherein the sublimable substance comprises adamantane.

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(10) EVIDENCE APPENDIX

None.

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(11) RELATED PROCEEDINGS APPENDIX

None.